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No. 96-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TANA WOOD, Superintendent,
Washington State Penitentiary,

Petitioner,

vs.

MITCHELL E. RUPE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the penalty phase of a capital case, does the Eighth Amendment require a state to admit gravely unreliable evidence, unless it is "so unreliable that it has no probative value at all"?

2. Would an affirmative answer to Question 1 be a "new rule" within the meaning of *Teague* v. *Lane*?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

In the accompanying brief, *amicus* argues that the division of opinion between the Ninth Circuit in this case, on one side, and other circuits and the highest courts of several states on the other, makes this case appropriate for review on certiorari. In addition, the Ninth Circuit's analysis of the *Teague* issue is in conflict with this Court's precedents.

The ruling in this case threatens the integrity of capital sentencing proceedings with "junk science" from both sides. Finally, the ruling in this case calls into question the constitutionality of the federal death penalty statute.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's decision overturns a sentence affirmed nine years ago. The state decision resolved the present issue in a manner well within the dictates of this Court's precedents and well within the mainstream of American jurisprudence. Such second-guessing of valid state court decisions is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

December, 1996

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Over 15 years ago, Mitchell Rupe murdered Candace Hemmig and Twila Capron while robbing a bank. *State* v. *Rupe*, 683 P. 2d 571, 576-577 (Wash. 1984). The evidence of Rupe's guilt included his confession and his statements to three of his friends admitting involvement in the crimes. *Id.*, at 578. He was sentenced to death.

Two weeks before deciding Rupe's case, the Washington Supreme Court decided *State* v. *Bartholomew*, 683 P. 2d 1079 (1984). That case, like this one, involved an issue of the admissibility of a polygraph test of a witness in the penalty phase. After noting both Washington's wide-open statutory rule for penalty phase evidence and the rule of *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion), the court held that polygraph evidence submitted in mitigation would generally be admissible. *Bartholomew*, 683 P. 2d, at 1088-1089. However,

"the trial judge may refuse to accept such evidence if he is not convinced that the examiner is qualified or that the test was conducted under proper conditions." *Id.*, at 1089.[1]

At the guilt phase of Rupe's trial, defense counsel sought to introduce the police polygraph examination of Monte Yovetich. Yovetich was a friend of Rupe's who had some involvement in the crime, see *State* v. *Rupe*, 683 P. 2d, at 577-578, but the extent of his involvement is disputed. Washington follows the general rule that polygraphs are inadmissible in the guilt phase without a stipulation, *id.*, at 587, and the evidence was excluded.

Defendant's claim that *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) requires admission was rejected on the ground that *Chambers* is limited to reliable evidence. "The evidence offered by the defendant simply does not reach the minimal threshold of reliability necessary to its admission in a criminal proceeding." 683 P. 2d, at 588. The polygraphist who administered the test doubted its validity, citing various factors that may cause polygraphs to give incorrect results. *Ibid.*

The defense also sought to introduce the same polygraph examination in the penalty phase. The Washington Supreme Court noted that the standards in this phase were "more relaxed" but held that "polygraph examinations will not be admitted in those limited cases where their trustworthiness is seriously in doubt." *Ibid.*

The state court vacated Rupe's sentence and remanded the case for a new proceeding on other grounds. *Id.*, at 597. Rupe did not attempt to introduce the polygraph on retrial. Pet. for Cert. 9. He was resentenced to death, and the Washington Supreme Court affirmed. *State* v. *Rupe*, 743 P. 2d 210, 230 (1987). Multiple state collateral attacks were denied. *Rupe* v. *Wood*, 93 F. 3d 1434, 1438 (CA9 1996).

Rupe then filed a habeas corpus petition in federal District Court. After several more years, that court issued its decision. *Rupe* v. *Wood*, 863 F. Supp. 1315 (WD Wash. 1994). The

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1. The state court's rejection of Bartholomew's guilt-phase polygraph claim was ultimately validated by this Court last term, summarily reversing the Ninth Circuit. *Wood* v. *Bartholomew*, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995) (*per curiam*).

District Court interpreted the *Lockett* v. *Ohio*, 438 U. S. 586 (1978) line of cases to permit exclusion of mitigation evidence in capital penalty hearings *solely* on the ground of irrelevance. "[T]he Court has consistently held that *any* other barriers to the consideration of relevant mitigating evidence must fall." 863 F. Supp., at 1338 (emphasis added).

The District Court granted relief on this claim, expressly disagreeing with the decision of the Eleventh Circuit in *Alderman* v. *Zant*, 22 F. 3d 1541, 1555-1557 (CA11 1994) (applying the *Chambers* standard). The Court of Appeals affirmed. *Rupe* v. *Wood*, 93 F. 3d 1434, 1439-1441 (CA9 1996). Rupe's other claims were either rejected or have become moot. *Id.*, at 1437.

SUMMARY OF ARGUMENT

The decision in this case establishes an absolute rule with no exceptions that relevant evidence in mitigation must be admitted in the sentencing phase of a capital case. Evidence cannot be excluded on grounds of unreliability unless its unreliability is so great as to reduce its probative value to zero, *i.e.*, to render it irrelevant. This rule is said to follow from the *Lockett* v. *Ohio* line of cases.

The great weight of authority is to the contrary. The prevailing rule throughout the United States is that restrictions in the sentencing phase are greatly loosened, but that the trial judge retains the authority to exclude unreliable evidence even if it does have some probative value.

Petitioner has cited the Fifth, Tenth, and Eleventh Circuits as contrary to the present decision. The Seventh Circuit is also to the contrary, as are the highest courts of California, Alabama, Illinois, South Carolina, Nevada, Montana, Maryland, and New Jersey.

The Court of Appeals' *Teague* analysis asked the wrong question and got the wrong answer. The proper question is not whether the District Court reached a "correct" result under this Court's precedents, but rather whether the state courts would have found that interpretation dictated by then-existing precedent. This well-established law was simply ignored by the Court of Appeals.

The present decision threatens the integrity of capital sentencing proceedings with unreliable "junk science" from both sides. States will be compelled directly to admit it for defendants and by fairness to admit it for the prosecution. This result is contrary to the principle of *Gregg* v. *Georgia* to open the sentencing proceeding to *accurate* information.

The decision below would render unconstitutional the provision of the federal death penalty law which expressly empowers the judge to exclude evidence based on a Rule 403-like balancing test. The overturning of this vitally important statute *sub silento* is a matter worthy of this Court's attention.

ARGUMENT

I. The decision in the present case is in conflict with other circuits and with courts of last resort of multiple states on an important federal question.

A. Scope of the Present Decision.

The crux of this case is the decision by the District Court, endorsed by the Court of Appeals, that "exclusion of relevant evidence because of doubts about reliability violated the principle of *Lockett* and *Eddings*[2] by interfering with the jury's ability to weigh mitigating factors." *Rupe* v. *Wood*, 93 F. 3d 1434, 1440 (CA9 1996). There are no exceptions to this sweeping new rule so long as the evidence is relevant. "[P]otentially mitigating evidence can be excluded on reliability grounds, provided that the proffered evidence is so unreliable that it has *no probative value at all*," *ibid.* (emphasis added), in other words, if it is irrelevant. Cf. Fed. Rule Evid. 401.

The starting point of American evidence law is that relevant evidence is admissible, with many exceptions. *Id.*, Rule 402; J. Thayer, Preliminary Treatise on Evidence 264-266 (1898). The bulk of the Federal Rules consists of the exceptions. See Advisory Committee's Notes on Fed. Rule Evid. 402. The decision in this case would throw out *all* the exceptions and make

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2. *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982).

relevance the sole criterion of admissibility. Not surprisingly, this assertion is contrary to the great weight of authority.

B. Gacy v. Welborn.

Petitioner has already noted conflicts with three other federal circuits. Pet. for Cert. 13-14. We will therefore note only one more. In *Gacy* v. *Welborn*, 994 F. 2d 305, 315 (CA7 1993), Gacy sought to introduce his own hearsay statements through his mental health experts. The trial court sustained the prosecution's hearsay objection. The Seventh Circuit held that there was no constitutional error. *Id.*, at 316.[3] "The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them." *Ibid.* The hearsay rule is, of course, grounded in considerations of reliability. See E. Imwinkelried et al., Courtroom Criminal Evidence § 1001, p. 261 (2d ed. 1993). Because the hearsay nature of evidence alone never reduces its reliability to absolute zero, the rule of the Ninth Circuit in the present case would completely forbid states from invoking the hearsay rule against defendants in capital sentencing proceedings. *Gacy* holds flatly that there is no such rule.

Gacy did not expressly discuss *Lockett*. Instead, it noted the case closest on point, *Green* v. *Georgia*, 442 U. S. 95 (1979) (*per curiam*). See *Gacy*, *supra*, 994 F. 2d, at 316. *Green*, in turn, notes *Lockett* for the proposition that all proffered mitigation is relevant, if not necessarily admissible, 442 U. S., at 97, and holds that particularly *reliable* and critical hearsay must be admitted. *Ibid.* Thus, *Gacy* was not decided in ignorance of *Lockett* or its requirements, and it is in conflict with the decision in the present case.

C. State Court Decisions.

State court decisions have typically followed the path of *Green* as well. Whether based in the Due Process Clause or the Eighth Amendment, they recognize that some loosening of

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3. The state court had found a state-law error, but held it was harmless. *Id.*, at 315 (citing *People* v. *Gacy*, 530 N. Ed. 2d 1340, 1345 (Ill. 1988).)

standards may be required, but that courts can still exclude relevant but unreliable or misleading evidence. And they should. As the Supreme Court of New Jersey put it,

> "relaxed standards for admissibility are not to be equated with automatic admissibility. Judicial tolerance is not judicial license. . . . The court must retain discretion to exclude the evidence, in whole or in part, if its probative value is substantially outweighed by its unfounded or speculative character and its risk of confusion of the essential issues." *State* v. *Pitts*, 562 A. 2d 1320, 1350 (NJ 1989) (quoting *State* v. *Davis*, 477 A. 2d 308, 314 (NJ 1984)).

People v. *Fudge*, 7 Cal. 4th 1075, 1121-1123, 875 P. 2d 36, 64-65 (1994) is squarely on point and contrary to the decision below. Fudge wished to introduce his own polygraph test as "lingering doubt" evidence. Polygraph evidence is excluded by statute, Cal. Evid. Code § 351.1, but Fudge argued its admission was required by *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), precisely the argument accepted by the Ninth Circuit in the present case. Compare *Fudge*, 7 Cal. 4th, at 1122, 875 P. 2d, at 64 with *Rupe* v. *Wood*, 93 F. 3d 1434, 1440 (CA9 1996) (citing *Skipper*).

As did the Seventh Circuit in *Gacy*, the California Supreme Court in *Fudge* took its cue from *Green*. To override the state's evidence rules, the defendant must show that the evidence is both critical and reliable. *Fudge*, 7 Cal. 4th, at 1123, 875 P. 2d, at 65. Unreliable evidence fails both prongs, since it has minimal probative value and hence is not "critical." *Ibid.*

Significantly, *Fudge* places the burden of demonstrating reliability on the defendant. This makes sense where the category of evidence as a whole has been declared unreliable by statute, rule, or case law. Otherwise, well-settled rules would have to be retried in every case. The Court of Appeals' opinion in the present case not only casts the burden of proving unreliability on the state, but requires a showing "of *no* demonstrated scientific validity." *Rupe*, 93 F. 3d, at 1440 (emphasis added).

The Supreme Court of Alabama rejected penalty phase polygraphs in *Ex parte Hinton*, 548 So. 2d 562, 569-570 (1989). Although the Supreme Court decision does not discuss the

Lockett argument directly, it affirms a lower court ruling discussing and rejecting that argument. See *Hinton* v. *State*, 548 So. 2d 547, 561 (Ala. Crim. App. 1988).

The Supreme Court of Illinois rejected penalty phase polygraphs on reliability grounds in *People* v. *Szabo*, 447 N. E. 2d 193, 210 (1983). Illinois follows the rule that admission requirements are relaxed in the penalty phase, *ibid.*, but "the evidence must be reliable." *People* v. *Edwards*, 579 N. E. 2d 336, 364 (Ill. 1991) (after noting *Lockett*). See also *State* v. *Copeland*, 300 S. E. 2d 63, 69 (SC 1983) (polygraph inadmissible in penalty phase); *Emil* v. *State*, 784 P. 2d 956, 960 (Nev. 1989) (same); *State* v. *Staat*, 811 P. 2d 1261, 1262 (Mont. 1991) (polygraphs not admissible in any criminal proceeding).

The Court of Appeals of Maryland followed *People* v. *Fudge*, *supra*, in *Whittlesey* v. *State*, 665 A. 2d 223 (Md. 1995). In that case, the trial judge had excluded hearsay in the belief that the state hearsay rule applied fully to the penalty phase. This was state-law error, requiring reversal and remand. *Id.*, at 243.

However, while the *Whittlesey* court noted the requirement of some relaxation under *Lockett* as well as the statute, *ibid.*, it did not throw the doors wide open. The *Lockett* rule "*does not require the admission of unreliable evidence.*" *Ibid.* (citing *Green* and *Fudge*) (emphasis added). Hence, a remand for consideration of *reliable* evidence, with an exercise of discretion by the trial judge, was required. *Id.*, at 244.

On an issue closely related to the present question, the Supreme Court of New Jersey excluded evidence from a sodium amytal interview in *State* v. *Pitts*, *supra*, 562 A. 2d, at 1350. Applying its rule of tolerance but not license from *State* v. *Davis*, *supra*, the New Jersey court upheld the trial judge's "balancing the potential impact of the proposed testimony against its apparent unreliability." *Ibid.*

In case after case, we see the same principle applied. Limits on evidence at sentencing are relaxed, but not entirely abandoned. The holding of the Court of Appeals in the present case is certainly a distinct minority view, to say the least.

II. The Court of Appeals' *Teague* analysis conflicts with relevant decisions of this Court.

The Court of Appeals' analysis of the *Teague* issue in this case, in its entirety, consists of this:[4]

> "Nor did the district court announce any 'new rule' not recognized as generally applicable at the time of Rupe's trial and hence not applicable in habeas proceedings. *See Teague v. Lane*, 489 U.S. at 305-310, 109 S.Ct. at 1073-1075. The district court endeavored, faithfully and successfully, to follow earlier announced constitutional standards of general applicability stemming from *Lockett* and *Eddings*. *See, e.g., Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079." *Rupe* v. *Wood*, 93 F. 3d 1435, 1440-1441 (CA9 1996).

This is precisely the view of "new rules" rejected by this Court over six years ago in *Butler* v. *McKellar*, 494 U. S. 407 (1990), *Saffle* v. *Parks*, 494 U. S. 484 (1990), and *Sawyer* v. *Smith*, 497 U. S. 227 (1990). To find such a fundamental misunderstanding of a major doctrine this late in its development is surprising, to say the least.

The Court of Appeals' focus on whether the District Court faithfully endeavored to apply general principles in this Court's precedents is utterly misplaced in a *Teague* analysis. The correct question is "whether a *state* court considering [Rupe's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Saffle*, 494 U. S., at 488 (emphasis added). Conversely, could reasonable minds have differed on

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4. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality). Petitioner raises the *Teague* issue in the body of the petition, although not in the Questions Presented. See Pet. for Cert. i, 12-13, n. 5. The *Teague* issue is "fairly included" in the underlying question. *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 245, 114 S. Ct. 948, 953 (1994). The state does not raise the Antiterrorism and Effective Death Penalty Act of 1996. In the context of the present case, a question of "pure law" (not a "mixed question") resolved on the merits by the state court, 28 U. S. C. § 2254 new subdivision (d) appears to be largely a codification of *Teague*, and its applicability would not change the result.

the point? See *Butler*, 494 U. S., at 415. A division of authority among jurisdictions is powerful evidence that they could, *ibid.*, and state court decisions count as much as federal in this analysis. *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 249, 114 S. Ct. 948, 956 (1994); see also *Sawyer*, 497 U. S., at 237 (contrary decision of state court supporting "newness" of later rule).

Despite the mandate of *Butler*, *Sawyer*, and *Caspari* to consider views of other jurisdictions in determining the reasonableness of the state court's position, the Court of Appeals in this case simply stuck its head in the sand. A substantial body of contrary authority exists, as demonstrated in the previous section of this brief and in the Petition for Writ of Certiorari. Indeed, the District Court opinion affirmed by the Court of Appeals noted and expressly disagreed with the considered opinion of a sister circuit. See *Rupe* v. *Wood*, 863 F. Supp. 1315, 1339 (WD Wash. 1994). Yet the Court of Appeals' opinion on the polygraph point does not mention a single decision of a circuit other than itself or a state other than Washington. See *Rupe*, *supra*, 93 F. 3d, at 1439-1441. This parochialism is squarely contrary to this Court's *Teague* precedents.

The Court of Appeals' opinion is also contrary to *Sawyer*, in that it distills a specific rule from a general principle and declares that the resulting rule is not "new." *Sawyer* held that the fact that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) "was 'rooted' in the Eighth Amendment command of reliable sentencing" derived from *Lockett*, *Eddings*, and other cases did not "suffice[] to show that *Caldwell* was not a new rule." *Sawyer*, 497 U. S., at 235-236. The *Teague* "test would be meaningless if applied at this level of generality." *Id.*, at 236. Yet in the present case, the Court of Appeals brushes aside the *Teague* objection by saying "The district court endeavored, faithfully and successfully, to follow earlier announced constitutional standards *of general applicability* stemming from *Lockett* and *Edwards*." *Rupe*, *supra*, 93 F. 3d, at 1440-1441 (emphasis added).

The whole point of *Sawyer* is that general standards yield "new rules" within the meaning of *Teague* when they crystalize into specific rules, so long as reasonable minds could differ whether those rules really do follow from the standards. The

assertion that *Lockett* mandates the admission of *unreliable* evidence is a prime example.

None of the Supreme Court cases cited by the Court of Appeals focused on reliable versus unreliable evidence, because that question was not presented by the facts. General statements in these opinions, therefore, should not be considered controlling in a case where the issue is actually presented. *Cohens* v. *Virginia*, 6 Wheat. 264, 399-400 (1821).

Lockett and *Eddings* were not evidence cases at all. The mitigating facts were placed before the sentencer, and the only question was whether the sentencer could consider them. *Lockett* v. *Ohio*, 438 U. S. 586, 589-590 (1978) (prosecution's case showed Lockett to be a minor accomplice); *Eddings* v. *Oklahoma*, 455 U. S. 104, 107-109 (1982). *Skipper* v. *South Carolina*, 476 U. S. 1 (1986) did involve evidence, but it was competent evidence excluded on the sole basis that it was irrelevant. *Id.*, at 3.[5] Thus, *Skipper*'s statement of a "corollary rule" to *Eddings*, "that the sentencer may not . . . be precluded from considering 'any relevant mitigating evidence,' " *id.*, at 4, must be considered in that context.

Further evidence that *Skipper* is narrower than the Court of Appeals' interpretation of it can be seen in the way that it dealt with the state's attempts to save the trial judge's ruling. First, the state argued that the proffered evidence was "incompetent lay opinion testimony" and that its exclusion "was no more than an evenhanded application of rules restricting the use of opinion testimony." *Id.*, at 5-6. If *Lockett* really trumped all rules of evidence but relevance, that would have been the simple and obvious answer to this argument. Instead, the *Skipper* Court held that this evidence was not opinion. *Id.*, at 6. *Skipper* also notes without any hint of disapproval that another witness's opinion had been excluded. *Ibid.*

Second, the state argued that the proffered evidence was merely cumulative. *Id.*, at 7. Again, if *Lockett* had wiped out the discretion of trial judges to exclude cumulative evidence, cf.

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5. "Petitioner also sought to introduce testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail." *Ibid.*

Fed. Rule Evid. 403, that would have been the simple answer. Instead, *Skipper* held that on the facts of the specific case the evidence could not be considered merely cumulative. *Id.*, at 8.

The manner in which *Skipper* deals with these issues implies that objections to mitigating evidence based on rules other than relevance may still be made and sustained in capital sentencing proceedings. Certainly it would not be "an illogical or even a grudging application" of *Skipper*. See *Butler* v. *McKellar*, *supra*, 494 U. S., at 415. Particularly with regard to such notoriously unreliable categories as hearsay, lay opinion, and "junk science," a certain degree of control over evidence can be seen as more faithful to the principle of *accurate* sentencing information, see *Gregg* v. *Georgia*, 428 U. S. 153, 190 (1976) (lead opinion), than is the Ninth Circuit's "anything goes" rule in the present case.

The courts which have interpreted the *Lockett/Eddings/Skipper* line of cases to permit exclusion of unreliable evidence have rendered reasonable interpretations of this Court's precedents. Brushing off *Teague* with the simplistic statement that the District Court did a good job interpreting precedent, *Rupe* v. *Wood*, *supra*, 93 F. 3d, at 1440-1441, the Court of Appeals runs roughshod over the principle of that doctrine. This departure from binding precedent is an appropriate ground for a writ of certiorari under Supreme Court Rule 10(c).

III. The decision in this case threatens the integrity and reliability of capital sentencing.

On its face, the opinion in the present case creates only a unilateral rule in favor of the defendant. Yet it would be a mistake to believe that defendants will not feel the sting of the same rule operating in reverse. The creation of a rule for one side creates a strong hydraulic pressure to allow the other side the benefit of the same or a similar rule. *Payne* v. *Tennessee*, 501 U. S. 808 (1991), permitting emotion-laden "victim impact" testimony, was based in large part on the fact that the combination of the *Eddings* rule and *Booth* v. *Maryland*, 482 U. S. 496 (1987) had "unfairly weighted the scales in a capital trial." *Payne*, 501 U. S., at 822; see also *id.*, at 839 (Souter, J.,

concurring) ("significantly imbalanced process"). Similarly, although not stated in the opinion in *Georgia* v. *McCollum*, 505 U. S. 42 (1992), there can be little doubt that the inherent unfairness of a one-sided application of *Batson* v. *Kentucky*, 476 U. S. 79 (1986) was a factor in that decision.

Outside the specific guarantees of the Bill of Rights, the federal Constitution has little to say about the admissibility of evidence, see *Dowling* v. *United States*, 493 U. S. 342, 352 (1990), even in capital cases. *Romano* v. *Oklahoma*, 129 L. Ed. 2d 1, 10, 114 S. Ct. 2004, 2009 (1994). If the door is thrown wide open to "junk science" for the defendant, states will be largely free to admit it for the prosecution. One state high court, at least, has already said it would. "If polygraph results were available to defendants when deemed favorable to their cause, an equal entitlement should be accorded the prosecutor when favorable to the state's case." *Emil* v. *State*, 784 P. 2d 956, 960 (Nev. 1989). A technique supported by a small minority in the field but denounced by the vast majority of scientists as *almost* useless will then be admissible as evidence. Voice stress tests, for example, have been uniformly denounced by courts. See Annot., Admissibility of Voice Stress Evaluation Test Results or of Statements Made During Test, 47 ALR 4th 1202, 1207-1210 (1986) (collecting cases). Yet the present case would mandate their admission for defendants, and their admission against defendants will not be far behind. The same will be true of every new technique with even a scintilla of probative value.

A doctrine that began by emphasizing "a vital need for *accurate* information to impose a rational sentence," *Gregg* v. *Georgia*, 428 U. S. 153, 190 (1976) (lead opinion) (emphasis added), has been twisted into just the opposite.

IV. The Ninth Circuit's decision in this case would invalidate the federal death penalty.

If the decision in the present case is correct, then 18 U. S. C. § 3593(c) is unconstitutional. Conversely, if that statute is constitutional, the decision below is incorrect.

> "Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U. S. C. § 3593(c).

This language is lifted from Federal Rule of Evidence 403, with two significant omissions. The word "substantially" before "outweighed" has been dropped, as has the "waste of time" clause at the end of the Rule. The first omission implies a *greater* authority in the trial judge to exclude evidence, see *United States* v. *Nguyen*, 928 F. Supp. 1525, 1547 (DC Kan. 1996), while the second is not material to the present case. Rule 403 authorizes trial judges to exclude unreliable evidence on the ground it may mislead the jury. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 595 (1993) (quoting Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 FRD 631, 632 (1991)). "Polygraph evidence has often been excluded on a Rule 403 analysis," because of its false aura of infallibility. Berger, Evidentiary Framework, in Reference Manual of Scientific Evidence 115, n. 330 (Federal Judicial Center 1994).

Congress has expressly decided to extend this Rule 403 authority to the penalty phase of capital cases, and perhaps even strengthen it. "Thus, any evidence presented must be relevant, *reliable* and its probative value must outweigh any danger of unfair prejudice." *Nguyen*, 928 F. Supp., at 1546 (emphasis added).[6] If Congress's decision is to be struck down, it should be done with considerably more thought than appears to have gone into the Court of Appeals' opinion in the present case.

Other examples of ill effects of this decision can be imagined, but these should suffice. The exclusion of some evidence, despite its relevance, is a long-established feature of Anglo-American jury trials. Arguments can be made about whether and to what extent these rules should be loosened for jury

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6. Interestingly, the defendant in *Nguyen* attacked the federal evidence standard as being not restrictive *enough*. *Ibid*. This may be the latest variant of the Scylla and Charybdis attack on capital punishment.

sentencing, as opposed to guilt determination. The Court of Appeals' opinion in the present case, however, just sweeps away the entire body of evidence law, with no apparent heed for the consequences. This must not stand.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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